No. 2876.

UNITED STATES
Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY,
Appellant,
vs.
HUGH MACKAY,
Appellee.

Upon Appeal from the United States District Court for the District of Arizona.

REPLY BRIEF.

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This reply is tendered for the reason that Appellant had not filed or served his brief within the time limited by the rules, and counsel had no opportunity to examine the same before filing the brief of appellee.

We might not have considered it so necessary to reply but for some misstatements of facts in Appellant's brief, as will be disclosed by an examination of the Record:

1. Counsel states that at the time of the transaction out of which this suit arose, W. W. Root was Secretary. This is at least a controverted point. F. W. Lowery testified he was Secretary (p. 102), and prepared the Minutes

(p. 103). In further support of this you will note that the first mortgage was not attested by W. W. Root, while the second was. The testimony of Mr. Mackay is also suggestive, at least, of the fact. He testified that Mr. Root told him Mr. Lowery was a Director (p. 51), that Mr. Lowery did the writing of the resolution and the minutes (p. 52).

2. It is also stated that Mrs. A. G. Root "owned in her own name" nearly all the stock. If this means that the shares stood in her name on the books of the company, it is an error. Nowhere is it so claimed by Appellant. The truth is that they did not. The certificate book did not so show. (Defendant's Exhibit 29.) Mr. Root himself testified that "the certificates were issued to Mr. E. G. McDermott." "The certificates were assigned to her." "Those certificates are now held in trust by a trustee." "I have not got the certificates present in court" (p. 38). "Those certificates have been in Mrs. Root's possession up until the time the trustees had them" (p. 43). The stock, so far as the records of the company and testimony disclosed, stood in the name of E. G. McDermott. Mr. Root only claimed that the certificates were assigned to his wife.

3. As to the minutes of the meeting in July, 1913, counsel at the top of page 8 of his brief used the following language regarding the testimony of Mr. Lowery: "That the resolution so prepared by him was adopted, but that the same was not dated or signed by any of the directors, nor was, so far as he knew, any minutes of said meeting taken or recorded, but that a typewritten copy of the resolution so prepared by him, but undated and unsigned as aforesaid, was left by him and placed as a loose sheet in the minute book of the company (Tr. p. 100-105)." An examination of the record at the pages cited will disclose an entirely different state of facts. It will be found that

the resolution adopted was embodied in the minutes of the meeting, a draft of which minutes was introduced in evidence (Plaintiff's Exhibit W), and which minutes were afterwards typewritten, and as witness, Lowery, says: "I think they were signed" (p. 105). They were not signed by the directors. Minutes are not usually signed by the Board of Directors. They are signed by the Secretary, and when ordered approved, which is usually at a later meeting, they are then signed as approved by the President.

4. In the brief of Appellee, it is stated (pp. 15 and 16) that the meeting of the stockholders and Board of Directors was held July 19, 1913. The meeting was held either on the 22nd or 23rd of July, A. D. 1913. (Mr. Lowery's testimony, pp. 101-103, "Tuesday, July 22nd.") (Mr. Sykes' testimony, pp. 131-134-135-137-143), (Mr. Mackay's testimony, p. 78).

5. In regard to the account books of the company, counsel not having been in the case at the trial, is excused for saying that no effort was made to have those books produced. This is contrary to the fact. Notice to produce was given. Mr. Lowery testified that he presumed the books were in the possession of Mr. Root and that the mortgaged property was generally referred to as the White Hills properties (p. 114). Mr. Root admitted there was a record of the disbursements (p. 37), and such books as Mr. Lowery testified to (pp. 112-113). Counsel for Mr. Root claimed these books were not the books of The Norma Mining Company, although admitting he had them.

6. Counsel in his brief at page 5 says: "It does not appear why the balance that might be procured from the sale of the first mortgage was to be paid to Mr. Root." That is very plain to us. Mr. Root had allowed the debt of the company to him to the full amount of the mortgage

to be cancelled. (Plaintiff's Exhibit W and Testimony of Mr. Lowery, p. 101-2.) That being the case, this balance was his. For the same reason when the Five Thousand Dollar ($5,000) mortgage and notes were executed an equal amount of the company's indebtedness to Mr. Root was cancelled and the proceeds of any disposition of the notes belonged to Mr. Root. The very fact that the proceeds were to be paid to Mr. Root, as stated by this receipt in Mr. Root's handwriting, although signed by Mr. Mackay, is, if not altogether conclusive, very persuasive of the position of appellee and throws a strong light on how these men, Mr. Mackay and Mr. Root, viewed the transaction at the time.

7. We hesitate to further point out what appears to us to be additional inaccurate statements of counsel for Appellant at page 7 of his brief and repeated at page 16. Counsel states that Mr. Lowery was employed by Mr. Mackay. The Record discloses that Mr. Root took Mr. Mackay to Mr. Lowery's office (p. 51) and asked Mr. Mackay if he would trust Mr. Lowery to prepare the papers (p. 98). Mr. Lowery in turn asked Mr. Root if it would be satisfactory to him that he represent Mr. Mackay. Mr. Root said it would be, as he was anxious for this arrangement. It can hardly be said in the general acceptation of such language that Mr. Lowery had entered the employ of Appellee, Mackay.

8. We presume it is unnecessary to urge on this court that if the facts warranted it, in order to take advantage of the Statute of Limitations, the same must be pleaded. While the facts do not warrant it, no mention was made thereof in the trial court.

9. We are constrained to the view that the principles in support of which counsel has cited some authorities are not applicable to the case at bar, and further, that a reading of the cases will not support the alleged prin-

ciples. It is contended that "a corporation may not be held liable as a mere accommodation maker of notes and mortgages when executed for a purpose other than for which it was organized," and "that no officer of the company, even if he should control practically all of the stock of the company, may deed or mortgage the assets of the company for other than a corporate purpose." The record in this case does not disclose the purpose for which the Appellant company was organized. Inferentially, however, it would be deduced that under certain conditions a corporation would be liable as an accommodation maker. Boards of Directors and corporate officers acting in a fiduciary capacity must observe the limitations of their trust. Stockholders, however, are not so restricted. The record here shows that these mortgages were authorized not only by the Board of Directors, but also by the stockholders. The holders of all of the stock of a purely private corporation may do with the assets of the corporation that which they might do with their own. Notwithstanding this, the record in this case shows that these notes and mortgages were not accommodation paper.

10. We believe the Record clearly shows that these mortgages were duly authorized, that the company was indebted to Mr. Root (p. 37, pp. 112-113), and that a valuable consideration passed to the company, viz: the cancellation of an equal amount of its indebtedness to Mr. Root. The very strongest view of all the testimony in favor of the Appellant could only be that there might be a conflict as to whether or not the mortgages were authorized and as to whether or not there was a consideration therefor passing to the Appellant. These issues were issues of fact.

> "In chancery cases where the evidence is conflicting and witnesses have been examined orally in court, there is the same necessity exist-

ing as when there has been a trial by jury, that the error in the finding of the facts shall be clear and palpable to authorize a reversal, because the trial judge has the witnesses before him and can observe their manner and appearances, and is thus afforded facilities often of the greatest importance in determining their credibility."

Hughey vs. Hughey, 48 Ill. App., 315.

"The supreme court, though trying a case *de novo,* on appeal, will not disturb the finding of the district court, unless the finding and decree cannot be reconciled with any reasonable construction of the testimony."

Gadsden vs. Phelps, 56 N. W., 314.

Justice Thayer in Snider vs. Dobson, 74 Federal, p. 757, says:

"This court, however, has repeatedly declared that where a master or chancellor has considered conflicting evidence, and made a finding thereon, the finding will be taken as presumptively correct, and will be permitted to stand, unless an obvious error has intervened in the application of the law, or some serious and important mistake appears to have been made in the consideration of the evidence. Warren vs. Burt, 12 U. S. App. 591, 600, 7 C. C. A. 105, 58 Fed. 101; Latta vs. Granger, U. S. App. 15 C. C. A. 228, 230 and 68 Fed. 69; Paxson vs. Brown, 27 U. S. App. 49, 10 C. C. A., 135, 144, and 61 Fed. 874; Stuart vs. Hayden, 18 C. C. A. 618, 72 Fed., 402, 408; McKinley vs. Williams (decided April 17, 1896), 74 Fed. 94. The same rule has been announced

and acted upon by the Supreme Court of the United States on several occasions. Tilghman vs. Proctor, 125 U. S. 136, 8 Sup. Ct. 894; Kimberly vs. Arms, 129 U. S.; Furrer vs. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821. See, also, Richards vs. Todd, 127 Mass. 172, and Donnell vs. Insurance Co., 2 Sumn. 371, Fed. Cas. No. 3,987. We have concluded, therefore, that, inasmuch as the case turned upon an issue of fact, and inasmuch as the evidence was fully adequate to justify the finding made by the trial judge, it should be allowed to stand.''

Respectfully submitted,

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Attorneys for Appellee.